Supreme Court, U.S.
FILED

(3) 94 892 NOV 15 1994

No. _____

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

C.W., By Her Guardian Ad Litem,
Loralyn McKinley, Esquire, Petitioner,

v.

Dolores Wasiek, Respondent.

On Petition for a Writ of Certiorari
to the Superior Court of Pennsylvania

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA PART II

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Orphans' Court Division
Court of Common Pleas of Philadelphia

O.C. NO. 3107 of 1987

Estate of CYNTHIA WOJCIECHOWSKI,
an alleged incompetent

D E C R E E

AND NOW, this 1st day of August, 1991, the Exceptions filed by Lorrie McKinley, Esquire, Guardian ad litem, to the Order and Opinion of Jamison, J. dated February 28, 1990 are dismissed, and the Order is affirmed.

Bruno, J. dissents and files a dissenting Opinion.

BY THE COURT:

Pawelec, A.J.
Administrative Judge

Lorrie McKinley, Esquire
Guardian ad litem
Exceptant

Marta Engdahl, Esquire

Orphans' Court Division
Court of Common Pleas of Philadelphia

O.C. NO. 3107 of 1987

Estate of CYNTHIA WOJCIECHOWSKI,
an alleged incompetent

Before: PAWELEC, ADM. J., BRUNO, BONAVITACOLA, JJ. and KLEIN and GUTOWICZ, Senior Judges (Specially Presiding)

OPINION SUR EXCEPTIONS

PAWELEC, ADM.J. Aug. 01, 1991

Dolores Wasiak, the mother of Cynthia Wojciechowski (hereinafter referred to as Cynthia) filed a petition seeking to have Cynthia declared incompetent, herself appointed as guardian of the person of Cynthia and authorization for herself as guardian to consent to a laparoscopic tubal ligation for Cynthia. After extensive hearings, the hearing judge granted the relief requested. Exceptions to the

decree were filed by the guardian ad litem appointed by the hearing judge to represent the interests of Cynthia. They are presently before the court for disposition.

In her exceptions, the guardian ad litem contends that the order and opinion of the hearing judge contravene the mandate announced In Re Terwillinger, 304 Pa. Super 553, 450 A.2d 1376 (1983) and are violative of the constitutional rights of bodily integrity and reproductive autonomy afforded Cynthia by the Fourteenth Amendment of the United States Constitution. In essence, exceptant argues the petitioner failed to prove by clear and convincing evidence that laparoscopic tubal ligation is necessary for the welfare of Cynthia, that less intrusive methods of contraception were unworkable,

and that a tubal ligation is the only practicable alternative.

Our usual scope of review is delineated in Estate of Dembiec, 468 A.2d 1107 (Pa. Super 1983), at p. 1110, wherein the court stated:

> On appeal, the findings of an Orphans' Court Judge who hears testimony without a jury are entitled to the weight of a jury verdict....This rule is particularly applicable "to findings of fact which are predicated upon the credibility of the witnesses, whom the Judge has had the opportunity to hear and observe, and upon the weight given to their testimony."...In reviewing the Orphans' Court findings, our task is to ensure that the record is free from legal error and to determine if the Orphans' Court findings are supported by competent and adequate evidence and are not predicated upon capricious disbelief of competent and credible evidence.... However, we are not limited when we review the legal conclusions that Orphans' Court has derived from those facts. (Citations omitted).

However, we note that In Re Terwilliger, supra, the Superior Court stated that

on appeal, review in a case of this nature should be of the broadest scope and the reviewing court need not be bound by the inferences or deductions of the hearing judge. We determine these exceptions in accord with this direction.

The hearing judge, in her comprehensive opinion, extensively reviewed and analyzed the testimony and the evidence of both sides. We see no reason to duplicate her review and analysis.

For the purpose of the creation of a self-sustaining document, we reiterate that the following medical evidence is uncontested. Cynthia has an emotional and intellectual age of three to five years. She suffers from cerebral palsy, scoliosis and grand mal epilepsy seizures (n.t. pp. 9-12). As a result of her medical condition, she takes various medications.

Despite the medication, her seizure disorder is very tenuous, not very stable and not easily controlled. According to the medical testimony, her condition is irreversible.

Based on Cynthia's history, the medical experts were in agreement as to the detrimental effects of pregnancy. The medical testimony indicated that there were several possible theoretical medical alternatives to prevent pregnancy, but concluded that the risks were too great to choose any of these alternatives. The guardian ad litem failed to present any contrary evidence in regard to the stated medical problems and dangers to Cynthia were she to become pregnant. The social workers and psychologists who testified focused on alternative methods of contraception and suggested that constant

surveillance would prevent pregnancy. In the event of an unexpected pregnancy, abortion or adoption were offered as possible solutions.

When alternatives were presented to the medical experts testifying on behalf of the petitioner, they were rejected as neither viable nor in Cynthia's best interests.

Cynthia's mother, Mrs. Dolores Wasiak, was called as a witness. Although Cynthia's legal residence is with her mother, she has resided in a Community Living Arrangement (hereinafter referred to as C.L.A.) since she was 12 years old. Mrs. Wasiak stated that her reason for filing this petition was that Cynthia is getting older and is a very affectionate child with a myriad of medical problems,

and that a pregnancy would be very harmful to Cynthia.

No one has indicated that Mrs. Wasiak has any interest adverse to Cynthia throughout these proceedings.

Upon completion of testimony and after a review of the divergence of opinion as to whether tubal ligation was an appropriate method of contraception herein, the trial judge appointed Dr. Ronald J. Bolognese as an impartial witness in this matter. The guardian ad litem objected to Dr. Bolognese's appointment. The appointment of an impartial medical expert is in accordance with the findings in Terwillinger. The court permitted petitioner the opportunity to introduce supplemental evidence of changed circumstances regarding Cynthia's

behavioral changes and of a particular incident which occurred at the C.L.A.

In this regard, the testimony of Mrs. Wasiak indicated that because of certain serious behavioral problems of Cynthia, a behavior modification treatment was instituted. Cynthia's Dilantin dosage had been reduced but had to be restored and then increased because of two severe seizures. In addition, in March of 1989, a male C.L.A. resident was seen leaving Cynthia's bedroom. On review, we conclude it was not only appropriate but necessary for the trial judge to allow this testimony of changed circumstances. The court correctly stated that from the date the petition was filed, Cynthia became a ward of the court and any information of a substantial nature which bore upon the prayer of the petition should be heard by the court.

Dr. Bolognese, Chairman of the Department of Obstetrics and Gynecology at Pennsylvania Hospital was called as the court's impartial witness. Dr. Bolognese is an obstetrician whose area of specialty is high risk pregnancy and whose medical credentials are impeccable. He testified that in his expert opinion, Cynthia should never conceive unless her medical condition drastically changes during her reproductive age bracket. He ruled out hormonal therapy (as a contraceptive means) by daily use of birth control pills or even weekly ingestion of other types of medication because of potential mixed reactions to Cynthia's seizure disorder. Dr. Bolognese further stated that the risk complications arising as result of a tubal ligation were minimal and that, in fact, the risk of material death, secondary to

an abortion, is the same. Dr. Bolognese further states, however, that in his opinion, the issue inherent in a pregnancy and in tubal ligation were vastly different.

Mr. McFalls, the Director of Ken Crest's residential services, admitted that the C.L.A.'s policy of checking on Cynthia every 15 minutes to half hour was instituted as much for the purpose of preventing Cynthia from engaging in sexual activity as it was for monitoring her seizures.

This court makes no comment upon the correctness of such an approach. It is not within the purview of this court upon review to adjudicate whether sexual activity should or should not be permissible for this unfortunate woman. The trial court reviewed the evidence thoroughly and

did not abuse its discretion in reaching the conclusion stated in the record.

In reviewing the guardian ad litem's objections, it appears that the ad litem has misinterpreted the standard applicable to the case in question. The issue is not whether sterilization is the least restrictive means of birth control in general, but rather, considering Cynthia's medical condition, what type of birth control provides the least intrusion into Cynthia's life and does not subject her to unnecessary risk of her life or health?

The instant case does not present the facts which were before the court in Terwilliger, supra. In Terwilliger, the court was faced with a situation wherein the alleged incompetent was 25 years of age, had already given birth to a child and was, other than for retardation, an

otherwise healthy young woman. The attending physician could not form an opinion as to whether or not Ms. Terwilliger understood her own sexuality and suggested birth control pills as an adequate contraceptive measure. Testimony also indicated that Ms. Terwilliger lived with her family, had an IQ of 33, and had continued to be sexually active. The court determined that under the circumstances, a clear and convincing case had not been presented which would warrant sterilization as a means of birth control.

In Terwilliger, at 450 A.2d 1383 et seq., the court set forth the following guidelines:

> (2) The possibility that the incompetent person will experience trauma or psychological damage if she becomes pregnant or gives birth, and, conversely, the possibility of trauma or psychological damage from the sterilization operation.

(3) The likelihood that the individual will voluntarily engage in sexual activity or be exposed to situations where sexual intercourse is imposed upon her.

(4) The inability of the incompetent person to understand reproduction or contraception and the likely permanence of that inability.

. . .

(7) The ability of the incompetent person to care for a child, or the possibility that the incompetent may at some future date be able to marry and, with a spouse, care for a child.

(8) Evidence that scientific or medical advances may occur within the foreseeable future which will make possible either improvement of the individual's condition or alternative and less drastic sterilization procedures.

(9) A demonstration that the proponents of sterilization are seeking it in good faith and that their primary concern is for the best interests of the incompetent person rather than their own or the public's convenience. (Footnote omitted) Id. at 264, 426 A.2d at 483.

In the case at bar, the trial court utilized all of the above guidelines in

reaching a decision. For Cynthia, the trauma of sterilization, if any, would be no greater than the trauma of an abortion or of giving birth. The trial court was presented with facts from which one could conclude that Cynthia had engaged in some form of sexual activity. It is clear from the evidence that Cynthia lacks the ability to understand reproduction or contraception and it is unlikely that her medical and/or psychological condition will change in the foreseeable future. It is also clear that Cynthia is incapable of caring for a child, unable to marry, and, with a spouse care for a child. There was no evidence to indicate that there is any medical possibility on the horizon which would afford Cynthia safe contraceptive results, less drastic than sterilization, given her unstable grand mal seizure

condition. It is particularly noteworthy that the last guideline enumerated in Terwilliger was omitted from the guardian ad litem's brief. This case is not an attempt by a parent to impose sterilization as a means of contraception on a mentally retarded but otherwise medically healthy child. There is no question that the trial court correctly concluded from competent evidence that Cynthia's mother has only Cynthia's best interest at heart.

The court's findings of fact are fully supported by the record and are appropriate in light of the physical problems of Cynthia Wojciechowski. These facts justify the conclusion reached by the hearing judge. This conclusion is in accord with the law as enunciated by our appellate court. This is not a matter of the use of a tubal ligation as a method of

contraception where other contraceptive methods will be effective but rather a matter of authorizing medical care in Cynthia's best interest considering her many physical infirmities.

Accordingly, the Order of the trial court is affirmed.

BY THE COURT:

Pawelec, A.J.
Administrative Judge

Orphans' Court Division
Court of Common Pleas of Philadelphia

ESTATE OF CYNTHIA WOJCIECHOWSKI,
AN ALLEGED INCOMPETENT

No. 3107 of 1987

BEFORE: PAWELEC, A.J., BRUNO, BONAVITACOLA, JJ., and KLEIN and GUTOWICZ, Senior Judges (Specially Presiding)

DISSENTING OPINION

BRUNO, J.

I do not disagree with the hearing judge's finding that this woman is incompetent. I do not disagree with the hearing judge's finding that pregnancy would be "an unmitigated disaster" for this woman. I do not disagree that Cynthia's mother has what she perceives to be Cynthia's best interest at heart. I do, however, vehemently disagree with the conclusion of the hearing judge and of my colleagues on the court en banc that a

laparoscopic tubal ligation is in the best interest of this incompetent.

The entire focus of the proceedings before the hearing judge seemed to be the effects of a pregnancy on this woman. As I said above, I do not disagree with her finding that a pregnancy would be disastrous for this unfortunate woman. However, there was absolutely no evidence produced by the petitioner that Cynthia is or ever was sexually active. There was some evidence that she was sexually curious. Given her emotional and intellectual age of three to five years, a certain amount of sexual curiosity is to be expected. However, sexual curiosity is not sexual activity. The hearing judge placed great emphasis on the fact that at one time a male patient was seen leaving Cynthia's room and after that episode

Cynthia pointed to her pubic area. It is ridiculous to say that is evidence of sexual activity. Cynthia also pointed to her pubic area when she was being interviewed by a psychiatrist. Obviously, the psychiatrist did not attempt to have sex with her.

Rather than focusing on the detrimental effects of pregnancy, the hearing judge should have focused on protecting Cynthia from rape and sexual intercourse. The protection of this woman's physical person is the real issue in this case. Sterilization will not and cannot protect Cynthia from untoward sexual advances and abuse. It can only present on the unwanted results of sexual abuse and activity, pregnancy. What about the trauma of rape? What about the death sentence of AIDS and the horrors of

syphilis? By placing the sole emphasis on preventing pregnancy by protecting this woman's physical person, the hearing judge completely disregarded the principles outlined in Matter of Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1983).

In Matter of Terwilliger, 450 A.2d 1376, 1383, the Superior Court plainly and clearly stated that it must be established by clear and convincing evidence that: ". . . sterilization is the only practicable means of contraception, i.e., all less drastic contraceptive methods, including supervision, education and training are unworkable and detailed medical testimony must show that the sterilization requested is the least significant intrusion necessary to protect the interest of the individual." (emphasis in original). By authorizing Cynthia's guardian to

consent to sterilization, the hearing judge totally ignored the competent evidence produced by the guardian ad litem that there are a number of less restrictive methods of pregnancy prevention. I read Terwilliger as requiring that those less restrictive methods of prevention must be tried and found wanting before a court can authorize the sterilization of a retarded person. There was no evidence produced by petitioner in this case to show that other, less drastic contraceptive measures have proven unworkable.

This woman's constitutional rights to privacy and to bodily integrity are being totally trampled upon because the hearing judge and my colleagues are focusing on the easiest method of pregnancy prevention rather than the protection of the physical person of this woman. I find it very

discomforting that the hearing judge finds great comfort in the opinions of the various British judges of the House of Lords who permitted the sterilization of an epileptic teenage woman. I would hesitate to quote an opinion of the House of Lords in an issue concerning an intensely personal constitutional right. British jurisprudence is not American jurisprudence. British judges routinely condone governmental action, e.g., detention of individuals without informing them of the charges against them, which would be unthinkable in this country.

The hearing judge repeatedly states that she does not want to adopt "A do nothing" attitude. I do not suggest that this Court adopt such an attitude. However, it is absolutely not necessary to take the most extreme measure possible

when it has not been shown that other, more reasonable measures are unworkable. The best medical experts and the best auto mechanics believe that: "When it ain't broke, don't fix it."

If, based on the facts in this case, this woman is sterilized by a decision not her own, I pray that we do not find ourselves starting down that path followed by others not too many years ago. A path that led not only to the sterilization of the "unfit," but also to death.

Because the hearing judge's finding absolutely contradicts the principles enunciated in Terwilliger, I would sustain the exceptions of the guardian and vacate that portion of the Order authorizing the guardian to consent to the sterilization.

ORPHANS' COURT DIVISION
COURT OF COMMON PLEAS OF PHILADELPHIA

No. 3107 of 1987

ESTATE OF CYNTHIA WOJCIECHOWSKI
Alleged Incompetent

O R D E R

AND NOW, this 28th day of FEBRUARY, 1990, upon consideration of the petition to adjudicate Cynthia Wojciechowski an incompetent and to appoint Dolores Wasiak guardian of her person, and following extensive hearings thereon, and upon consideration of the briefs submitted, it is hereby Ordered and Decreed that

Cynthia Wojciechowski is adjudicated an incompetent.

Dolores Wasiak is appointed guardian of the person of Cynthia Wojciechowski.

Said guardian of the person is hereby authorized to consent to a laparoscopic tubal ligation for Cynthia Wojciechowski.

_____

J.

ORPHANS' COURT DIVISION
COURT OF COMMON PLEAS OF PHILADELPHIA

No. 3107 of 1987

ESTATE OF CYNTHIA WOJCIECHOWSKI
Alleged Incompetent

OPINION

JAMISON, J.

Dolores Wasiak has petitioned the court to have her daughter, Cynthia Wojciechowski (hereinafter Cynthia or Cindy), adjudicated an incompetent, and to have herself appointed as guardian of the person of Cynthia to authorize such medical or surgical procedures as are necessary to prevent pregnancy. The petition alleges that Cynthia suffers from severe mental retardation, and that "a tubal ligation is the only practical means of contraception."

The Court appointed Lorrie McKinley, Esquire, guardian ad litem "to represent the best interests of the alleged incompetent" in connection with the pending petition. Ms. McKinley, an instructor in clinical law at the University of Pennsylvania Law School, is associated with the Penn Legal Assistance Office.

Prior to the hearing, the Court consulted with counsel, reviewed with them the guidelines set forth in Matter of Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1982), and suggested that they retain experts of the highest caliber.

The guardian ad litem took an early stance that tubal ligation or any form of contraception is not in Cynthia's best interest and, at present, education and supervision are the preferred methods of preventing sexual activity, rape, or

conception. The guardian's cross-examination of petitioner's witnesses and direct examination of her witnesses reflect this adversarial posture.

Because of the formidable responsibility of applying principles of law, ethics and medical practice to the facts of this case, the testimony will be reviewed in detail.

I. Review of Evidence

Cynthia Wojciechowski is a 20 year old mentally retarded woman, who suffers from scoliosis, cerebral palsy and grand mal epilepsy. She is mute, has a very limited ability to sign, and has an emotional and intellectual age of three to five years. It is undisputed that her mental and physical disabilities are irreversible.

Cynthia was present on the first day of the hearings. She waved to the court with her "Kermit the Frog" puppet each time her name was mentioned. Otherwise, she seemed to be oblivious to the proceedings. Counsel agreed that Cynthia had no concept of the nature of the hearings and understood nothing other than her name. Cynthia remained in the courtroom and was quite restless throughout the testimony of the first witness, Ernest F. Keller, who reported on the high incidence of crime, particularly rape, in the City of Philadelphia. It was agreed it would be preferable that Cynthia not be present when her mother and the other witnesses testified. Additionally,it was obvious that it would be less distracting and emotionally painful for her mother to testify out of Cynthia's presence. Accordingly, Cynthia

was not present at any hearing other than her meeting with the Court in chambers.

At a later stage of the proceeding, the Court met with Cynthia, in the presence of counsel and her mother, who served as an informal interpreter for Cynthia's signing and gestures. Communication with Cynthia was difficult at best. Cynthia, who appeared anxious to please, signed "Yes" in response to virtually every question.

Cynthia was easily distracted, and showed little change in mood throughout the session. She concentrated primarily on a Walkman tape. She signed that she had brought her nephew, Ricky, into this world, that girls differ from boys in that women carry purses. In response to questioning, she signed, without differentiation, that she would like to have a baby,

that she would also like to have a puppy, that babies can be bought in a store and that here brother and sister-in-law had bought her nephew, Ricky. When asked to write her name, she wrote her first name. She willingly hugged everyone in the room, including a male court clerk who was called in to test her response to an unknown male. When asked how "babies get in tummies," she pointed to a necklace on a doll. She paid scant attention and drifted from any area on which the Court tried to focus her attention. She was able to write "dog" when shown a picture of the Judge's puppy and able to distinguish between statuettes of a dog and a rabbit. She was extremely suggestible, compliant and anxious to please. Her affect was that of an uncommunicative preschool child. It would have been futile

and well beyond her ken to have discussed reproduction and contraception with her. She demonstrated affection for and dependence on her mother who had considerable ability to respond to and communicate her expressions.

As the first witness, Dolores Wasiak, natural guardian and custodial parent of Cynthia, related that she was divorced from Cynthia's father, Frederick Wojciechowski, in 1978. She has since remarried. Mr. Wojciechowski consented to and joined in Mrs. Wasiak's petition, but did not participate in these proceedings. Petitioner and Mr. Wojciechowski have two other children, a son who is five years older than Cynthia, and a daughter three years older, neither of whom has any developmental problem.

Cynthia's legal residence is with her mother and step-father at 3060 Edgemont Street in the Kensington section of Philadelphia. She has resided in a community living arrangement (CLA) located at 4311 Sentner Street, operated by Ken Crest Centers, Inc., since she was 12 years old.

Mrs. Wasiak stated her reason for filing the petition was that Cindy is getting older and is a very affectionate child, with "a lot of medical problems," for whom pregnancy would be very harmful.

In recounting Cynthia's medical history from infancy, the petitioner was tearful, visibly upset and strained. She recalled that her delivery was difficult, and that Cynthia was born with an eye infection which necessitated placement in a newborn isolation unit. Mrs. Wasiak noticed that the infant had excessive

blinking of the yes. When Cynthia was three months old, she suffered her first seizure which lasted for about an hour. Throughout her first year, she had frequent seizures for which she was treated at Episcopal and St. Christopher's Hospitals. At 15 months, she underwent successful eye surgery under general anesthesia for correction of a strabismus. Thereafter, she had follow-up care at St. Christopher's Hospital, where, at age two and a half, she was enrolled in a program for developmental therapy. At age four, she went to the Ken Crest Early Intervention Program, and at age five, she attended a public school program for the severely and profoundly impaired. Cynthia has never spoken, although as a baby she babbled, and at about age four and a half, she made vowel sounds. As a young child,

she was very stubborn and had frequent temper tantrums. She often refused to eat or to sit down at the dinner table and "disrupted the whole family." Mrs. Wasiak consulted several physicians and a psychologist regarding Cynthia's behavior problems. Counselors recommended that Cynthia be placed in a group home and, at age 12, she was placed in the CLA at which she presently resides. The home is shared by one other female and three male residents who range in age from 17 to 22.

Cynthia attends a life skills program a Northeast High School and on alternate weeks she attends Swensen Skills Center. Transportation is provided by school bus. It was anticipated that upon graduation, she will go to a sheltered workshop. Every other week, Mrs. Wasiak takes Cynthia to her home from Friday evening to

Sunday evening. On those week-ends, Cynthia often visits at her brother's home. She looks at books, plays with toys, particularly Sesame Street's "Big Bird" and plays with her five year old nephew, Ricky. Cynthia also spends holidays with her family.

Cynthia has learned to dress and feed herself, but she is far from self-sufficient. She will continue to live in a group home so long as the funding is available. She takes her anti-seizure medication under supervision. She responds to music, likes to dance and attends dances at the CLA. She enjoys watching television, particularly the Sesame Street programs. She has a signing vocabulary of about 50 signs.

Several recent incidents have increased Mrs. Wasiak's concern for her

daughter's safety. On one occasion, during an outing with her Ken Crest group at Penn's Landing, Cynthia had been left alone in a public bathroom. On another occasion, during a visit to the CLA, Mrs. Wasiak observed a young male resident standing outside Cynthia's bedroom door while Cynthia was in her room changing.

Overall, Mrs. Wasiak is pleased with the care Cynthia receives at Ken Crest and finds it to be the best placement presently available. However, she has genuine concerns about continued adequate government funding for the CLA, frequent staff changes, and inconsistencies in their level of training and ability. With the recent cutbacks in government support for the retarded, Mrs. Wasiak is apprehensive that the CLA may be phased out.

Cynthia has had hospitalizations and surgery under general anesthesia for dental work, ear wax removal, extraction of wisdom teeth and a gingivectomy. None had have untoward results.

Mrs. Wasiak observed that Cynthia, who has had a great deal of pain throughout her young life, is spunky and is able to let others know when she is in pain. She is an extremely affectionate girl who hugs and kisses strangers, as well as people whom she knows. She seems to crave physical contact with others and will touch people even if they do not approach her.

According to her mother, Cynthia has regular menstrual periods. She is able to change her own sanitary pads, but doesn't know when to stop wearing them. She once wore a pad for a full month.

Mrs. Wasiak does not believe that Cynthia has been sexually active. Mrs. Wasiak has spoken to medical professionals about various methods of contraception for Cindy.

Mrs. Wasiak stated that Cynthia did not understand menstruation, reproduction, intercourse, conception, or fertility, and was not cognizant that certain parts of her body should not be touched by others.

Mrs. Wasiak testified that because of her seizure disorder, Cynthia should not be left alone for periods of more than one-quarter to one-half hour at Ken Crest. She reported one incident, however, in which Cynthia had a seizure and fell from her bed while unattended.

Mrs. Wasiak, who herself has had a laparoscopic tubal ligation, is of the opinion that sterilization by minilapa-

roscopy is the best and safest contraception for Cynthia. Although Mrs. Wasiak agreed that Cynthia could participate in sexuality training, she was doubtful that Cynthia could understand the program. She is concerned that Cynthia continues to embrace strangers after being told that such behavior is inappropriate.

Marna Sternbach, M.D., Cynthia's treating physician since September 1986, testified that she see Cynthia at Germantown Hospital for regular checkups for her seizure disorder and cerebral palsy. In November 1987, Cynthia was hospitalized for seizure disorder related tegrital toxicity, difficulty in walking, nausea, vomiting, and possible pneumonia. Cynthia also sees a neurologist on consultation. Her medication in 1988 was Phenobarbital 90 milligrams two times a day, 300

milligrams of Dilantin at night and 800 milligrams of Tegrital four times a day. Although the medication generally controls the seizures, viral illnesses or any infection may promote a seizure. Without medication, she could have a fatal status epilepticus.

Dr. Sternbach reported that Cindy is unable to give a medical history or discuss pregnancy. When questioned as to possible methods of birth control, she was of the opinion that barrier methods would not be appropriate; that because of pain and possible pelvic infection, an intra-uterine device (IUD) would be too risky for Cindy; and that oral contraceptives are not recommended because of possible side effects. Dr. Sternbach added that a pregnancy would be harmful for Cynthia's mental and physical health. She

recommended a tubal ligation as the simplest most definitive procedure for the prevention of pregnancy with the fewest risks for Cindy. Dr. Sternbach explained that the medications Cindy takes are all teratogenic and each could cause congenital abnormalities in a fetus.

Dr. Sternbach reported that in her practice she had one case of a mentally retarded young woman living in a supervised CLA who became pregnant. The pregnancy was not discovered until about the twentieth week and the patient underwent a mid-trimester abortion.

Dr. Sternbach characterized a tubal ligation through a laparoscope as a "pretty simple procedure" which takes 15 minutes and is generally done on an outpatient basis. In Cindy's case, an

overnight stay and general anesthesia would probably be required.

Melvin S. Heller, M.D., a board certified psychiatrist, testified as an expert witness for the petitioner. Dr. Heller's credentials include a degree from Tufts Medical School in 1948, a residency in child psychiatry at Yale University from 1950 to 1954, and a fellowship in child psychiatry at the Child Study Center of the Institute of Pennsylvania Hospital. He has been in private practice in adult and child psychiatry since 1957, and has, for over 30 years, been Clinical Professor of Psychiatry and Director of the Institute of Law & Health Sciences at Temple University. He has, inter alia, served a Chief Psychiatric Consultant to the Court of Common Pleas of Philadelphia and as Director of the Division of Forensic

Psychiatry, Office of Mental Health of the Commonwealth. Dr. Heller's credentials reflect a longstanding interest in patients' rights and mental health law.

Dr. Heller examined Cindy at the offices of Dr. Jerome Knast, a psychologist who is fluent in sign language. He also visited her and the staff at the Ken Crest CLA. Each evaluation lasted over an hour and a half. Dr. Heller also reviewed Cynthia's medical, psychological and school records.

After reviewing Cynthia's childhood developmental history, Dr. Heller testified that her pre-school records revealed that she was moderately severely retarded with an I.Q. of about 30 to 32. School reports indicate that Cynthia is "not educable but trainable," that she is quite socially isolated and that her cognitive

language skills are fixed at age three and a half.

Based upon the medical records, Dr. Heller testified that Cynthia's tonic clonic seizures, accompanied by stiffening and shaking, occur about once or twice a month and are an element of her cerebral palsy. Cynthia has some atrophy of the brain and her mutism is caused by organic brain damage. She has a partial paralysis of the left side (stable left hemiparesis) with residual awkwardness of the left arm and an awkward gait. Dr. Heller concluded from the gynecological report of Dr. Nancy C. Czarnecki, that Cynthia's hymen is not intact and she does not have a virginal tract.

Dr. Heller comment on the various pejorative connotations of the word "sterilization." "It is a legal term ...

a very generic term and includes a number of conditions, some of which are reminiscent of gas chambers, like the removal of the ovaries, or the surgical removal of the male testicles." He noted that tubal ligation, on the other hand, and various other contraceptive methods, although called sterilization, are not sterilization in that sense.

Dr. Heller sharply disagreed with the opinion in the written report of Elissa Lewin, an expert witness for the guardian ad litem, that since Cynthia is never alone, "a less restrictive and more positive approach to avoiding rape and pregnancy would be programming (sic) for appropriate social skills."

Dr. Heller was of the opinion that Cynthia has no ability to grant or refuse informed consent or exercise reasonable

judgment. He characterized her as a "young woman who is substantially retarded and who is emotionally fixated about the age of four or five...she is not even at the pre-school emotional level. She is a very childish, endearing, snugly kind of a person, a touching little girl...."

Dr. Heller was pessimistic about Cindy's chances of improvement. He concluded that she is going to be a child and remain a child vulnerable to molestation for the rest of her life. He is convinced that "birth control is necessary in this highly vulnerable person and it cannot be dismissed on the erroneous and unchecked conclusion that she is under constant watch because of her epilepsy...."

Dr. Heller reasoned further that increased security and more stringent monitoring would be detrimental to Cindy:

"Ken Crest is responding as well as they can but this custodial approach to contraception at best is going to make this child/woman an asexual sheltered individual with no chance to relate. She is going to continue in this highly dependent, abnormal situation, which is not in her best interest. She is going to become increasingly a depressed vegetable. Her only hope is perhaps to be able to relate to other human beings, peers, appropriately, even within the parameters of how two or three or four year old children relate to each other, and this is very, very important."

Dr. Heller related that he has had substantial experience and "spent a professional lifetime prescribing supervision for people." Yet, on occasions where he has written orders in state hospitals for one on one supervision as suicide precautions, or in the correctional system, where there is maximum supervision, he has nevertheless found people hanging and women in the county prison system who get pregnant.

In Dr. Heller's judgment, even the most heroic and skilled efforts to provide Cynthia with "programming for appropriate social skills" as recommended by Ms. Lewin, is futile. "You can't teach a person appropriate social skills if they can't communicate with you."

It was Dr. Heller's opinion that pregnancy and childbirth would be traumatic for Cynthia. He hypothesized:

> "What would happen if Cynthia became pregnant and despite her seizures and hemiparesis had a normal delivery and a healthy infant? She could not be a competent mother and would have no ability to care for the child. Is the child adoptable? Can Cynthia sign permission for the adoption? Cynthia is going to be traumatized. She could not be separated from her Kermit the Puppet without kissing it. She is not going to be separated from a baby without being terribly, terribly traumatized."

Dr. Heller wholeheartedly endorsed tubal ligation for Cynthia. In his considered opinion, contraception by tubal

ligation is:

> "... the least intrusive, least physiologically harmful approach, which is reversible in the large majority of cases... and which would in no way alter her physiology, her periods, her ovarian functions, her secondary sexual characteristics, her feelings of femininity, or interfere with her ability to relate to others."

Dr. Heller was skeptical of the guardian's theories of "least restrictive alternative," "socialization" and "normalization" as applied to Cynthia. In his judgment, these concepts and policies are fine in theory; they are not effective in practice. Dr. Heller is convinced that Cynthia's learning ability is so impaired by irreversible neurological damage that her prognosis for learning substantially more than she knows now is not favorable.

Petitioner called Jerome F. Knast, Ph.D., a psychologist who had evaluated Cynthia through formal testing and

behavior observations and reviewed her medical and psychological records. Dr. Knast stated her IQ to be 52 and determined her adaptive behavior composite at the equivalent of ages five to eight. He reported that her poor picture arrangement sub-test indicates that she has great difficulty in understanding social clauses and consequences of behavior. She is not able to anticipate and plan appropriate actions in social situations. On the PPVT-R test, Cindy's oral receptive vocabulary was found to be only at the level of a three year old.

Dr. Knast related that Cynthia twice displayed instances of inappropriate behavior with him. During a test in which Cynthia was attempting to communicate a story, she lifted her blouse, pulled down the waistband of her pants to show him her

navel and laughed inappropriately. Earlier, she had reached over to tickle him on the stomach a couple of times and to touch his nose.

Dr. Knast believed that Cynthia is unable to give informed consent and that pregnancy would create a potential health risk for her. He concluded that sterilization would be in Cynthia's best interest and "should be necessary for her habilitation program for her to function in a more autonomous manner." He further recommended that Cynthia be given additional communication skills training and socialization activity in a total communications environment with other developmentally disabled teenagers and young adults and should participate in social activities of other CLA's.

Dr. Knast determined that Cynthia's mental retardation, which will not improve, interferes with her ability to learn sign language. He found that:

> "Cynthia is very interested in activity that is of a sexual nature like the tickling and the touching of myself...likes to sit in people's laps, male and female, and be cuddled and rubbed...she sometimes will slap men on their buttocks. She is very sensual and she wants physical contact. She seems to really make physical contact with other people even if they don't approach her first, and I think she is not aware of being seductive or flirtatious or of a foreplay kind of nature."

He was of the opinion that it would take at least two to three years to develop the communication skills that are the first requisite for behavior modification training.

Dr. Knast stated that sterilization will improve Cynthia's level of rehabilitation and will lead to greater autonomy for her. She could "develop more

normalized kind of dating and pre-dating kind of behavior as far as being able to dance, to hold hands, to kiss, to touch; but it might allow some more of those kinds of activities to take place for her without the concern that it might lead to pregnancy." He doubted that a combination of education and supervision as proposed by the guardian ad litem can be effective in preventing pregnancy for Cynthia.

H. Michael Seitz, Jr., M.D., a board certified gynecologist and obstetrician, an associate professor of obstetrics and gynecology at the University of Pennsylvania School of Medicine since 1970 and a staff physician of the Hospital of the University of Pennsylvania, also testified as an expert for the petitioner.

Upon review of Cynthia's medical records, Dr. Seitz was of the opinion that

she was ovulating and could become pregnant; that a pregnancy would be detrimental to her grand mal epilepsy which requires toxic levels of anticonvulstants to maintain her in a seizure free condition; that statistics indicate she might be more seizure prone during pregnancy and that pregnancy for her would be extremely traumatizing emotionally. In the event she became pregnant, a therapeutic abortion would be extremely traumatic. Abortion also carries the risks of perforation, hemorrhage and infection. Should a child be born, there is at least a four-fold greater chance that the child would inherit the epileptic condition and a twelve percent greater change of major congenital defects. If Cynthia were to be on the high dosage of seizure medication she presently requires during a pregnancy,

she could spontaneously abort or have a premature birth, both of which are traumatizing to the patient. Dr. Seitz believes that if Cynthia's seizure medication were withdrawn, "she would have frequent seizures which would be exceedingly dangerous to the fetus, as will as the maternal organism."

Dr. Seitz recommended a modified bilateral laparoscopic tubal ligation with high frequency current as the most effective, least restrictive method of prevention of pregnancy. He described it as a safe, simple, out-patient procedure, following which the patient usually returns home in a couple of hours and is back to work within 72 hours. He noted "one of the important things about it is, although it is considered to be a permanent sterilization, it really is not."

The rate of reversibility is upwards of 80%. The risk of failure is one in 300. Other risks are rare. The mortality rate is three per 100,000 and generally related to the anesthetic.

Dr. Seitz ruled out all other means of contraception, including barrier methods such as male condoms, diaphragm, or foam, because Cynthia lacks compliance or comprehension capabilities and because of the failure rate of 15 to 25%. Likewise, oral contraceptives are inappropriate, because of the risks of thromboembolic disease, hypertension, possible carcinogenicity and relatively short-term, rather than lifelong coverage.

With respect to other possible contraceptives, Dr. Seitz reported that the sole intrauterine device currently available is progestasert. It is

unsuitable for Cynthia because it has to be replaced each year and has the risks of infection, perforation and abnormal bleeding.

Dr. Seitz explained that laparoscopic electrocoagulation involves the insertion of a telescope into the belly button with a distal light source, identifying and burning a segment of the Fallopian tubes so that they are closed. Should the patient decide to reopen the tubes, they surgeon can often cut out the obstruction and successfully bring the two open ends together again.

Dr. Seitz concurred with the opinion of Dr. Sternbach that if Cynthia were to have a laparoscopy, it would be better for her, because of her seizure condition, to enter the hospital the day before the procedure and remain as an in-patient the

day after. Cynthia would probably be given sodium pentathol with a little gas anesthetic. After adequate pre-operative preparation and medication, she would not be at higher than average risk. Following laparoscopic coagulation, she would be out of bed in two hours and could resume light activities within 72 hours. Tylenol or a little codeine would be given for pain relief.

Dr. Seitz advocated this procedure as the ideal and least intrusive method of birth control for Cynthia. Although "it is more invasive than popping a pill, it is, under the circumstances, the most desirable."

Dr. Della Grossman, who holds a doctorate in education in counselling psychology from the University of Pennsylvania, was called as an expert by the

guardian ad litem. Dr Grossman found that Cynthia has a severe neurological deficit and she determined Cynthia's full scale IQ to be 48. Other test results indicate that Cynthia functions on an intellectual and social level of a pre-pubescent child. In her written report, Dr. Grossman concludes: "Cindy is currently living in an environment so closely supervised that the possibility of either voluntarily engaging in sexual activity or being exposed to forced sexual activity is extremely improbable."

Dr. Grossman stated that "since Cynthia is not sexually active, has no interest in becoming so, and is so closely supervised, she is not at risk of becoming pregnant and does not need birth control."

In Dr. Grossman's judgment the recommendation of Drs. Heller and Knast that

Cynthia be sterilized were not consistent with the "least restrictive alternative" doctrine, because they did not allow for any less restrictive alternatives, such as other forms of contraception and abortion. She might recommend sterilization for someone with a higher level of retardation than Cindy who lives freely in the community. Dr. Grossman disagreed with Dr. Knast's opinion that sterilization could increase Cynthia's level of habilitation because she would continue to have the same level of supervision necessitated by her seizure disorder.

Dr. Grossman also stated that sterilization was inconsistent with the least restrictive alternative in terms of dealing with the fear of attack on Cynthia, because sterilization cannot prevent rape, nor can it prevent the

trauma and emotional consequences of such an attack.

Dr. Grossman thought that if someone made sexual advances to Cindy, she would communicate what happened.

The guardian next called Elissa Lewin, a licensed psychologist whose specialty is "the sexuality of the mentally retarded." Ms. Lewin recalled that she had administered a basic sex education program to Cynthia when she was 12 and 13 years old and that Cynthia had been able to progress through the program. Although that training program provided identification of basic body parts and Cynthia then could differentiate between male and female, she cannot presently make that differentiation and has little knowledge of body parts.

Ms. Lewin, who performed two assessments of present sexual knowledge on Cynthia, concluded that she is not sexually active, has no awareness of sex, and her affectionate gestures are not indications of sexual interest. In her "Sexuality Evaluation Regarding Sterilization Report," Ms. Lewin noted that when she asked permission of Cynthia to touch her crotch, Cynthia signed "OK" and emphatically "Yes." Ms. Lewin expressed her concern about Cynthia's vulnerability to being victimized and noted that the staff believes that if Cynthia was left alone, she would go with anyone who was nice to her, that there is a chance of sexual abuse by a staff person, but that her risk of sexual abuse or involvement is "nominal."

Ms. Lewin determined that Cynthia's sexual activity is limited to masturbation, that she understands the concept of masturbation and was able to demonstrate it. During a discussion of intercourse, Cynthia gestured to Ms. Lewin that she engages in intercourse "all the time" and with every male she knows (her father, staff and CLA residents). She found that Cynthia has an early adolescent awakening of feelings and fantasies, is keenly aware of her sexuality and femininity and uses both whenever possible, even where inappropriate. She engages in inappropriate touching, especially with strangers.

Ms. Lewin was of the opinion that the least restrictive alternative for Cynthia would be a training program which would make her less vulnerable. She thought

that Dr. Heller, in applying the principle of least restrictive alternative, did not fully consider the circumstances of Cynthia's life, nor the options available to her. In her opinion, sterilization could never be considered the least restrictive alternative without considering other available alternatives, such as supervision and education.

Donna Fey, who holds a bachelor's degree in Psychology and Communications from the University of Hawaii, was called by the guardian ad litem as an expert in sexuality and disability. Ms. Fey had not met Cynthia, but based her opinion upon an interview with Cynthia's mother and her review of Ms. Lewin's sexuality report.

Ms. Fey stated that since Cynthia is not sexually active and has no inclination to be so, and because she is in no real

danger of sexual abuse, she should not be sterilized. She added that sterilization may, in fact, place Cynthia in greater danger of sexual abuse, because sterilized people are safer targets than those who may become pregnant. She suggested that if Cynthia became pregnant, she should take the morning after pill. She stated that there would be less risk for Cynthia to have an abortion than to take birth control pills and that sterilization only addresses the pregnancy risks, not the abuse risks.

To prevent sexual abuse, Ms. Fey recommended educational programs for Cynthia. She believed that Cynthia was a good candidate for these programs, including "circles" and "good touch, bad touch" which are specifically designed for persons with her level of functioning.

Ms. Fey testified that other means of birth control were a possibility for Cynthia and that Cynthia would be able to communicate her discomfort if she experienced any side effects from the pill. She thought that Norplants, which are hormonal inserts placed under the skin and last for up to five years, could possibly be used for Cynthia. (Norplants are not legal in the United States.) In her opinion, an abortion within 12 weeks is a safer procedure than sterilization.

James McFalls, the Director of Residential Services at Ken Crest, who is a behavior specialist, also recommended the behavior modification theory of birth control for Cynthia. He is not involved in day to day management of Cynthia's CLA, but serves in a supervisory capacity. Mr. McFall is confident that Ken Crest homes

"provide adequate supervision and training and have an adequate on-call system." Ken Crest has policies for dealing with sexuality, staffing, application of the least restrictive alternative, client abuse, as well as policies for supervision and training. With respect to the policy on sexuality, he believes the principles of least restrictive alternative and normalization dictate that the need should match the intervention: that if there is minimal need, there should be minimal intervention. Accordingly, contraception should be ordered only if there was a compelling need for contraception; sterilization only if there was a compelling need for sterilization.

Mr. McFalls predicted that if Cynthia were to have a tubal ligation, it would have no effect on her placement and

treatment, would not cause her any psychological harm and in no was affect her adjustment to her present placement.

At this point in the proceedings, the petitioner and guardian litem had submitted all of the testimony which they originally intended to offer and prepared briefs in support of their positions. An amicus curiae brief was also submitted by Pennsylvania Protection and Advocacy, Inc., which espoused the position of the guardian ad litem.

Following the Court's review of the brief and upon consideration of the high degree of scrutiny mandated by Terwilliger, the Court deemed it appropriate to appoint Dr. Ronald J. Bolognese as an impartial medical expert in the field of obstetrics and gynecology.

In addition, petitioner requested the Court to reopen the record to admit testimony concerning Cynthia's behavioral changes and an incident which occurred at the CLA following the end of the first set of hearings.

Accordingly, the Court scheduled additional hearings to receive petitioner's evidence and the testimony of the Court appointed expert.

At the supplemental hearing, Mrs. Wasiak testified that early in 1989 Cynthia exhibited serious behavior problems; she was self-abusive, biting and scratching herself, uncooperative and aggressive toward others. After consultations with a neurologist and a neuropsychologist, certain behavior modification programs were instituted, and her dosage of Dilantin was decreased from 300

milligrams to 250 milligrams daily. However, in May, she suffered a seizure, was hospitalized, and the Dilantin then was increased to 300 milligrams daily. On June 21st, she again had a violent seizure, fell on the street, cut the area over her right eye, and was scraped and bruised. The dosage of Dilantin was then increased to 400 milligrams daily. In June, 1989, she graduated from a retarded trainable class and it was anticipated that she would enter a sheltered workshop program in October or November, 1989.

Mrs. Wasiak reiterated her motives if filing the petition. She testified that:

> "[I] just wanted to see her have a life. I am not trying to stop her from any kind of life. I want to do the best I can to protect her from any new problems happening in her life."

Under cross-examination, Mrs. Wasiak noted that Cynthia's problem behavior had

decreased somewhat from two or three times a week to about once every two weeks. To the best of her knowledge, there had been no one on one education for Cynthia. She related that there had been substantial turnover in the Ken Crest staff during the last year.

Mrs. Wasiak further testified that she was advised of an incident on March 13, 1989, at about 9:30 P.M., when Francis, a male resident of the CLA, was found leaving Cynthia's bedroom. Cynthia indicated to Wilhelmina Brooks, the staff worker, that Francis had touched her on her breasts, her arm or waist, and her pubic area three times. At her next home visit two weeks later, Cynthia, related this incident to her mother without visible agitation.

Wilhelmina Brooks, the resident advisor and the staff supervisor at Cynthia's CLA, was called as a witness by the guardian ad litem. She testified that on the night of the incident, she came up from the basement, heard a noise on the monitor from Cynthia's room, and noticed the light was out in the upstairs hallway. As she switched the hallway light on, she saw Francis running from Cynthia's room. According to Ms. Brooks, Cynthia was visible upset and signed that Francis had touched her and pointed to her breasts, waist and public area. Her nightgown had been pulled up.

Monica Scott, presently the program manager at Cynthia's CLA, is a psychology student at Temple University who has received most of her training over the past year at Ken Crest. She sees Cynthia

daily, teaches her household chores and independent living skills. She observed that Cynthia is very friendly, lovable and affectionate. At times, she is stubborn and non-compliant. She notices that Cynthia is presently acting somewhat more appropriately for her age. During the period when Cynthia was excessively self-abusive, she rewarded her when some improvement was shown by approving home visits with her mother. Attempts have been made to redirect somewhat her affectionate manners with strangers. She reported that Cynthia's mother is not as strict with her as the CLA staff in discouraging immature behavior.

Cynthia is currently involved in a sign language program, a sexual behavior program, and nutrition and exercise programs. Ms. Scott stated that plans are

being made to move Cynthia and her roommate to an all female residence. These plans are quite tentative, since a site has not yet been located.

The guardian ad litem objected strenuously by letter prior to the hearing and at the hearing to the testimony of Dr. Bolognese, the court appointed medical expert. Inasmuch as Terwilliger suggests that the Hearing Judge call impartial experts, and the Court has the right and duty to control the proceedings, the testimony was received subject to the objection, and the objection is now overruled.

Dr. Bolognese, a graduate of Princeton University and the University of Pennsylvania School of Medicine, is board certified in obstetrics and gynecology and sub-boarded in maternal/fetal medicine.

He is Chairman of the Department of Obstetrics and Gynecology at Pennsylvania Hospital. He has written approximately 100 articles and three textbooks in the field of diagnostic laparoscopy, sterilization, therapeutic abortion and the care of the high risk patient in obstetrics and gynecology. Before his examination of Cynthia, he reviewed the records which had been forwarded to him by the guardian ad litem, including the brief of the Amicus Curiae, the guardian's Memorandum in Support of Proposed Findings of Fact and Conclusions of Law, a letter from Germantown Neurological Associates, a sexual evaluation regarding sterilization from Paul Volosov Associates, the Germantown Hospital records of admission on November 23, 1987 for seizure disorders, the record of the Audiology Department at

Temple University, and the report of the clinical audiologist from that institution dated March 15, 1988. He did not review the testimony of Dr. Heller. Dr. Bolognese testified that:

> "Cynthia's general demeanor was very pleasant, very friendly, almost coquettish, during her visit. She was very cooperative throughout both my discussing briefly with her mother what I planned to do as far as the examination and during her personal examination. She seemed to anticipate the pelvic portion of the examination. And on several occasions, as I did a general physical, beginning with listening to her lungs and checking her thyroid function and examining her breasts, she kept pointing to her genital area as if implying to me that I should get to that portion of the examination."

He reported that Cynthia is a well developed female with normal pelvic findings. "I think the one feature that was of some surprise to her mother was that Cynthia does not seem to be virginal." Cynthia tried to sign with him several

times - "more demonstrative signs, rather than word signing." He said that she easily tolerated the speculum examination and showed no discomfort since he was not examining a virginal vagina. His conclusion was:

> "I think clearly she requires some form of contraception . . . one would be a method of contraception that would not worsen her general medical status, largely her epileptic seizure disorder, and still provide her with a degree of safety that would be as close to 100% as possible.
>
> The second question would be whether or not, on a long term basis, her condition is going to be such that she could carry a pregnancy without great risk to herself and the fetus and be capable of handling that child after birth. . . .
>
> I don't think that any thing has surfaced in her records to suggest that her general medical condition will improve to the point that five years or ten years from now that her medical condition and her general mental abilities will be significantly improved to change that prognosis."

Dr. Bolognese characterized Cynthia as "a substantial epileptic" based upon the medication that she is taking. If she were to become pregnant, there would be considerable risk for congenital malformations, as well as mental and learning disorders of the newborn.

Dr. Bolognese is concerned that Cynthia would be at increased risk for seizure disorders during the course of a pregnancy. Repetitive seizures would potentially increase injury to herself and would place the fetus again at risk. The high doses of medication would quite possible have to be raised. A physician would be reluctant to allow a labor for her because of the time and medication involved, and might choose a Caesarean section which is a major operative procedure. During pregnancy, epileptics have a

greater seizure incidence due to fluid accumulation in the brain or changes in vascular supply.

Speaking as an obstetrician whose area of specialty is high risk pregnancy, he believes that Cynthia should never conceive unless her medical condition drastically changes during her reproductive age bracket. Nothing in his gynecological examination suggested that she is anatomically incapable of becoming pregnant or bearing a child.

He was of the opinion that the ideal method of contraception for Cynthia is one that will provide her 100 percent protection. He ruled out hormonal therapy by daily use of birth control pills or injectable Delaluten at weekly intervals because of mixed reactions to her seizure disorder. He considered Depo-Provera

unsatisfactory because it may cause liver abnormalities and Cynthia is taking drugs that require normal liver functions. The doctor stated that, "The experience of going through a temporary method that requires additional medication to prevent her pregnancy does not seem justified." He suggested that the best approach would be a method that would provide her close to 100 percent protection and proposed a laparoscopic tubal sterilization. Dr. Bolognese described the operation, which is done under general anesthesia, and is generally an outpatient procedure, in some detail:

> "In a normal patient without the complications of Cynthia, the patient is discharged about two hours after surgery. The procedure is immediately protective and is essentially 100%.
>
> In Cynthia's circumstances, because of her epilepsy or seizure disorder, she would require hospitalization the night before to appropriately modify

her medications, and then hospitalization after the procedure to again monitor her medications and seizures following the surgery."

Dr. Bolognese has performed 800 to 1,000 laparoscopies. He prefers his technique to the mini-laparoscopy described by Dr. Seitz. Although the mini-laparoscopy may be reversible, Dr. Bolognese's method is not. In the remote event Cynthia would ever opt to have a child, she could do so by in vitro fertilization.

When asked about the suggestion by witnesses for the guardian ad litem that abortion would be an alternative if Cynthia were to become pregnant, Dr. Bolognese replied that Cynthia probably would not know the symptoms of pregnancy early and a diagnosis might not be made during the first or second trimester. The risk of maternal death, secondary to an abortion of one in 100,000 cases, and from

laparoscopic tubal sterilization is the same. Accordingly, if Cynthia were to become pregnant and the pregnancy was terminated by abortion, she would have experienced the same risk involved in a laparoscopy and the basic problem of prevention of pregnancy would not have been addressed.

After a laparoscopy, there is no change in the woman's menstrual cycle, her psychological affect or feelings of femininity. In Dr. Bolognese's judgment, the risks inherent in a pregnancy and those of a tubal ligation are "worlds apart." The laparoscopy is relatively simple, whereas a pregnancy, complicated by seizure disorder and the necessity of a major surgical procedure, such as a Caesarean section and a longer recuperation

period, are far more dangerous and invasive.

Dr. Bolognese is not aware of any medical or scientific research that, within the foreseeable future, would result in some alternative or long-term method of birth control which might be appropriate for Cynthia.

In cross-examination, Dr. Bolognese did not agree that education, training and supervision, as proposed by Drs. Lewin and Grossman, would be effective in preventing possible victimization or involuntary intercourse. He stated:

> "I guess the only comment I had in reviewing the records and the testimony that preceded me was the position proposed that the likelihood of this young lady becoming pregnant was extremely small because of the circumstances in which she lives and that because of the severity of her disorder, someone was checking on her every 10 to 15 minutes. Perhaps I am a pessimist, but I truly can't believe that over the course of the

> next 20 years of her reproductive cycle that that feasibility will be there all the time, and, secondly, much can be achieved in 10 to 15 minutes that can cause a pregnancy, so I would be somewhat pessimistic that that approach will work. Now, whether she is capable of being educated and trained to decipher advances, again, I think that is sort of out of my province, but I don't understand how one can be trained to prevent rape."

Dr. Bolognese stated that he would not be surprised if Cynthia would voluntarily engage in sexual intercourse. In his opinion, Cynthia has a normal level of male/female interaction or interplay and she could well be sexually active.

In response to many of the questions posed by the guardian ad litem with "assumptions of possibilities," Dr. Bolognese said, "Anything is possible."

Dr. Marna Sternbach, Cynthia's primary treating physician, was recalled. Dr. Sternbach testified that after

Cynthia's serious behavior problems had surfaced in early 1989, she consulted with Cynthia's neurologist, who at first was reluctant to reduce the dosage of Dilantin. He agreed to do so in March or April and started her on Xanax (a tranquilizer) as well. She reported the increases in dosages of Dilantin after Cynthia's seizure in late May, and after the severe seizure in June. Since June 1989, Cynthia has been on 400 milligrams of Dilantin daily and has remained seizure free. Dr. Sternbach characterized Cynthia's seizure disorder as "very tenuous and not very stable or easily controlled." Dr. Sternbach confirmed the conclusions set forth in reply to an inquiry from Ms. McKinley, the guardian ad litem, in a letter from Karen Hartnett and kevin Hepler, M.D. dated March 7, 1988, that:

"a tubal ligation performed under general anesthesia would pose the same risks as for the general population which are considered relatively minor . . . birth control pills can cause a multitude of side effects ranging from nausea, depression, headaches, weight gain, etc., up to and including deep venous thrombosis and stroke. I do not feel Cynthia has the mental capabilities to express herself adequately regarding the many side effects... Cynthia's mental status is insufficient to understand the meaning of pregnancy and (she) would be incapable of raising a child.... Furthermore, a pregnancy could potentially increase her seizure activity and the seizure medication she takes could potentially have some harmful effects on the fetus...general anesthesia would probably not complicate the seizure disorder."

Dr. Sternbach believes that for Cindy, "a pregnancy would be devastating." The increased dosage of Dilantin makes her worry even more about the effects of pregnancy on Cynthia's seizures and the possibility of fetal malformation. Yet, if the dosage of Dilantin were reduced, in the event of pregnancy, Cynthia would be

subject to more frequent seizures. No good choice would exist.

A notation appears in Dr. Sternbach's records of Cynthia's visit on September 19, 1989 - "Caretaker notes increased kissing involvement with boyfriend." Dr. Sternbach concluded that the most reasonable and best form of birth control for Cynthia would be a tubal ligation.

The guardian ad litem recalled James McFalls, who stated that plans were being made to located additional Ken Crest housing and to have the women at the Sentner Street CLA moved to an all female residence where there would be increased supervision and which would provide a "less intense situation and be more age and socially appropriate." The annual cost for each resident ranges from $50,000 to $80,000. In Mr. McFalls' judgment,

Cindy's use of signs was greatly improved (Mr. McFalls is not fluent in signing). He stated that Cynthia recognized him and greeted him with a handshake. Since her tantrum and self-abusive behaviors are under some degree of control, he stated that more emphasis will be placed on good social interaction. Her present behavior program is based on "gentle teaching philosophy, non-adversive techniques." Mr. McFalls continues to be of the opinion that sterilization is not the least restrictive alternative. He thinks that Cynthia's progress over the past year has provided her with the material to become a more independent person and to control her own destiny a little bit more as she moves from a school situation to a work situation.

Mr. McFalls was critical of Dr. Bolognese's testimony because he thought Dr. Bolognese did not take into account the administration of medications and other controls that the CLA provides, and that his recommendation of a tubal ligation was "based just on mental retardation."

On cross-examination, Mr. McFalls stated Cynthia's mental intellectual age ranged between months to age seven. He believes that she is more intelligent and her adaptive abilities are higher than her test scores. He agreed that the policy of checking on Cynthia every 15 minutes to half hour was as much for the purpose of preventing sexual activity as for monitoring her seizures.

The Court has examined Cynthia's medical records which are extraordinarily

extensive for such a young woman. They indicate, inter alia, "grand mal epilepsy, frequent seizures, heavily medicated." She is "retarded in the trainable category." She has been treated for vaginitis, pneumonia, and urinary tract infection. IN 1968, she suffered 8 seizures; in 1970, 35; in 1972, 52; in 1973, 40; in 1974, 61; in 1975, 38; in 1976, 9; in 1977, 36; in 1978, 52; in 1979, 40; in 1980, 40. In 1987, it is noted that she was receiving "toxic levels of Tegritol."

II. Discussion and Conclusion

The Court finds, upon consideration of the voluminous evidence, that Cynthia's interest and future welfare will best be served by appointing her mother guardian of her person and authorizing her to consent to contraception by tubal ligation.

This finding is based not on assumptions and possibilities, but rather on the existing realities of Cynthia's physical and mental condition and her present and anticipated lifestyle. It is further founded upon a balancing of the risks and burdens attendant upon guaranteeing absolute protection from pregnancy, against the risks and uncertainties of "doing nothing," or reliance on hypothetical, impractical and theoretical concepts.

The realities, as established by clear and convincing evidence, are:

(1) Cynthia is an affectionate, coquettish, vulnerable and endearing young woman. She is severely retarded and functions on an intellectual and emotional level of a three to five year old child. She has been characterized as "trainable" but not educable. Cynthia is unable to

speak and suffers from scoliosis, cerebral palsy and a severe seizure disorder. Her grand mal epilepsy has been controlled by high, potentially toxic, doses of Dilantin, Phenobarbital and Tegritol. She must rely on staff at her CLA or her mother to administer the drugs.

(2) Cynthia does not understand contraception, intercourse, or pregnancy and birth. She lacks the capacity to make a decision about, or give an informed consent to, any medical treatment, including contraception and tubal ligation.

(3) Cynthia's physical and mental conditions will not improve. Examinations by competent gynecologists indicate that she is presumptively capable of bearing a child, and she will probably be fertile for at least another 20 years. Her hymen is not intact, and it is possible that she

has engaged in sexual intercourse which has not resulted in pregnancy. She exhibits the normal sexual drives and awareness for her physical age.

(4) Pregnancy would be an unmitigated disaster for Cynthia. The prospects or regulating or withdrawing her seizure medication, as well as the trauma attendant on the alternatives of abortion, a Caesarian section under general anesthesia, or labor and natural childbirth, and the inevitable separation of the newborn from Cynthia, are disturbing to contemplate. The high probability of fetal abnormality and the life threatening risks attendant on pregnancy, including increased seizure disorder, status epilepticus and major surgery dictate that permanent birth control and maximum protection should be afforded to Cynthia.

(5) Tubal ligation, a relatively minor surgical procedure, is the only practicable birth control method which can insure against pregnancy. Other methods, although less restrictive alternatives, are not appropriate for Cynthia. She is already heavily medicated. The possible negative interaction of the pill or other hormonal drugs with her present medication should be precluded, as should additional supervised administration of drugs. Moreover, oral contraceptives to be taken daily for the next 20 years have serious potential side effects. Cynthia is not a fit candidate for barrier methods, since these must be self-monitored.

(6) A sheltered environment does not afford sufficient protection against sexual advances. Cynthia may "voluntarily" succumb to overtures which she

perceives as affection or may be the victim of an attack. Furthermore, there is no certainty that her environment will remain as protective as it is presently. The plans for "education" and supervision advanced by witnesses for the guardian ad litem, though well intentioned, presuppose ideal circumstances in which unlimited funds exist to provide maximum individual education, training and supervision. Reality falls far short of such an ideal.

Furthermore, no amount of supervision offers total protection. As Dr. Bolognese stated: "Much can be achieved in 10 to 15 minutes that can cause a pregnancy."

The guardian ad litem chooses to minimize actualities of which the Court is mindful. For example, Dr. Sternbach described a mentally retarded resident of a supervised CLA, whose late discovered

pregnancy necessitated a third trimester abortion. Dr. Heller also testified about pregnancies in women under maximum supervision in the county prison system. There are frequent media accounts of rapes in nursing homes and convents.

This Court decided the distressing case of Estate of Joyce K., (O.C. Phila. No. 3343 of 1982), involving Joyce, a profoundly retarded 33 year old woman at Ebensburg State Hospital, a maximum security facility for the mentally impaired in Cambria County. She and another patient were raped and impregnated in that institution. The Court appointed Joyce's mother as her guardian to consent to a second trimester abortion.

In Estate of Barbara G. (O.C. Phil. No. 3039 of 1989), Dr. Jeffrey Buchhalter, Professor of Neurology at the University

of Pennsylvania, and a neurologist at Children's and Graduate Hospitals testified:

> ". . . It is a matter of common knowledge that every so often someone like Barbara with significant mental retardation, with or without a seizure disorder, becomes pregnant either from a staff member of from another patient."

(7) Despite the admonition in Terwilliger that only the disabled person's interests are involved, one cannot disregard the emotional and economic toll of such a case on the family, the caretakers, counsel, experts in medicine and psychology, the court and its personnel. To ask that the Court review what, if any, form of contraception is appropriate, every year or two is to deny any remedy, as the process is extremely burdensome.

It would be patently unfair to wait another two years, and other subsequent

intervals, to rehear this case. The Court is convinced that the matter has been comprehensively and exhaustively researched and presented. To postpone the decision further would serve no one's interest.

(8) The simplistic alternative proposed by the guardian ad litem -- "Do nothing" -- is untenable.

As Dr. Heller stated when questioned by the guardian ad litem about least restrictive alternatives:

> "One should try less restrictive alternatives but not capriciously, not with the idea that one can go back to the drawing board if it doesn't work, because there are timely intervals of intervention beyond which we have missed the boat . . . . We need to avoid our tendency to rely too heavily on what we call benign neglect because neglect is not always benign."

The amicus curiae, who has filed a brief on behalf of the Disabilities Law Project, has also taken the position that

sterilization is not in Cynthia's best interest. The amicus nonetheless urges the Court to utilize the doctrine of substituted judgment as an analytical method for deciding this case. Although this doctrine does not appear to be the teaching in Terwilliger, the New Jersey Supreme Court in In Re Grady, 85 N.J. 235, 426 A.2d 467 (1981), said:

> "We believe that an appropriate court must make the final determination whether consent to sterilization should be given on behalf of an incompetent individual. It must be the court's judgment and not just the parents' good faith decision that substitutes for the incompetent's consent." (426 A.2d at 475).

In substituting this Court's judgment for that of Cynthia, who since birth has lacked capacity to make a choice, the Court must assess the wants and needs of Cynthia and determine what is in her best

interest. (In the Matter of Moe, Mass. 555, 432 N.E.2d 712 (1982)).

As to the "Do nothing" alternative, the Court is without power to enforce the close supervision, education and maintenance that Cynthia requires. Several years ago, Cynthia had the "good touch-bad touch" training. She had completely forgotten these lessons by 1988, although the program is once again being administered. It is beyond the reach of a Court to order further training, to assure funding for such programs, or to ensure that Cynthia will understand and utilize those lessons. Further, the possibility that she might be raped or, in her own way, acquiesce in or submit to sexual intercourse cannot be ruled out. Since she cannot communicate, how would anyone know if and when she had intercourse? In

the event she were to become pregnant, assuming that abortion is still legal, how could it be ascertained that the pregnancy was safely within the first trimester? How would Cynthia respond to the bodily changes of a pregnancy -- the nausea and morning sickness, the movements of the fetus, the pain and discomforts of labor and delivery? What psychological damage or trauma will result from the pregnancy or birth, or the termination of the pregnancy? How can the effects of her anti-convulsant medication or a seizure on the fetus be predicted? Assuming, against great odds, a safe delivery and a healthy infant, who would adopt the child? There are over 25, 000 young children in Philadelphia requiring foster care. What saint would take the child of Cindy and an unknown father?

How comfortable can a Court be which makes the easy decision to "do nothing"?

Admittedly, on any given day there is a greater probability, assuming that she continues to be closely supervised, that Cynthia will not become pregnant. However, the petitioner's fears and concerns that she might are not imaginary.

The decision to sterilize Cynthia rests on the advice, opinions and clear and convincing evidence of her attending physician, a psychiatrist, two gynecologists, and a psychologist, all of whom are highly qualified and concerned. Each believes that it is in her best interests to be protected from pregnancy, and recommends that the optimum method of contraception for Cynthia is a tubal ligation. All are confident that the risks are minimal, and that other

alternative contraceptive methods are not only less reliable, but possibly harmful, given her seizure condition. Further, in the purely hypothetical and implausible event that Cynthia would in the future choose to have a child, 75% of tubal ligations by mini-laparoscopies are reversible, according to Dr. Seitz, and in vitro fertilization would be an option, according to Dr. Bolognese.

If the doctrine of substituted judgment were applicable, this Court could not delude itself that its choice would be Cynthia's choice. Cynthia has never had the ability to formulate or express a meaningful choice. Nor is the Court convinced that a judge, rather than the incompetent's mother, a zealous guardian ad litem, or the many experts in psychology, psychiatry, gynecology, and related

disciplines who have expressed differing opinions will make the most compassionate and considered choice. The Court has reviewed over a score of opinions from various jurisdictions, as well as law review and medical journal articles. Although safeguards and guidelines are set forth, there is little definitive law. No reference could directly dictate the best interests of the vulnerable, fragile, unique individual who is Cynthia Wojciechowski.

The Terwilliger court's warning that the interests of the parents and society should play no part in the decision is questionable. Rarely has this Court observed such pain and devotion as was manifested by Dolores Wasiak, Cynthia's mother, both in direct examination and under harsh cross-examination. It is

apparent to the Court that the petitioner is acting in good faith and solely for the protection and best interests of her daughter. The Court fails to find a conflict of interest between Cynthia and her mother, or between Cynthia and a caring and protecting society.

Ms. Wasiak's desire to let Cynthia have as much autonomy and normalcy as possible, but beyond that to protect and shield her to the greatest extent possible is commendable. As it is appropriate that a fit parent of a five year old child should be the principal decision maker about the care and welfare of the child, it is similarly appropriate that a parent of an adult child, who, because of a disability functions as a five year old, should be the principal decision maker for that child. In the opinion of this Court,

the decision making should be primarily that of the parents and their chosen physicians and counsellors, subject to the review of the Court.

The paramount right and prerogative of a parent to make such decisions is supported by Professor Elizabeth Scott, Associate Professor and Director of the Center for the Study of Children and the Law at the University of Virginia School of Law. In her comprehensive commentary, "Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy;" Duke Law Journal, Volume 1986, 806, she concludes, at page 865:

> "The desire to correct the abuses of the past is admirable. We should only take care that in pursuing this goal, we do not create a new set of problems for the future . . . . The law's objectives are best met by leaving the sterilization decision to the retarded person who is competent to make her own reproductive choices with only as much intervention as is

> necessary to facilitate her decisions. For retarded persons who cannot make their own decisions, parents - not courts - are the best surrogates."

(9) The decision to authorize a tubal ligation for Cynthia has nothing to do with the doctrines related to compulsory eugenic sterilization, or the specter of Justice Holmes' anachronistic statement in Buck v. Bell, 274 U.S. 200 (1927) that "three generations of imbeciles are enough." This is not an instance of involuntary sterilization based on fear that Cynthia's disabilities will be inherited by her offspring. On the contrary, considering her family history and medical uncertainty as to genetic transmission of seizures or organic brain damage and retardation, it cannot be predicted that Cynthia's potential offspring would be impaired solely on a

genetic basis. The risk of fetal abnormality is not the critical consideration in reaching the conclusion to permit the tubal ligation. Questions of eugenics, public policy, societal interests and basic civil rights of retarded persons other than Cynthia Wojciechowski are wholly irrelevant to these proceedings.

(10) Tubal ligation is a simple, minimally invasive low risk, permanent and virtually 100 percent reliable method of contraception.

Before tubal ligation procedures were perfected in the 1930's, hysterectomy was the only method of permanent female sterilization. Surgical sterilization in women has changed dramatically in the past 40 years. From 1950 to 1980, the number of tubal ligations increased from three million to more than 13 million, and

during the period 1970 to 1980, an estimated 5,526,000 women, ages 15 to 54, underwent tubal sterilization procedures in the United States, in non-federal short-stay hospitals. (See: The Number One Birth Control Method Worldwide, Sexual Medicine Today, February 1981, p. 11; Tubal Sterilization Among Women of Reproductive Age, United States, Update for the 1979-1980; Morbidity and Mortality Weekly Report, Volume 32 No. 3 SS.)

The American College of Obstetricians and Gynecologists Committee on Technical Bulletins (ACOG Technical Bulletin No. 113, February 1988) reports:

> "It is estimated that over the past decade, 800,000 to 1 million or more sterilization operations have been performed yearly in the United States."

Doctors Seitz and Bolognese report that the health risks, trauma and

psychological damage attendant upon sterilization are minimal compared to the risks and trauma of abortion, pregnancy and delivery. As Professor Scott has commented, "Physicians may generally be relied on to recommend the treatment that best promotes the patient's welfare with minimal risks."

Dr. Knast, the psychologist called by the petitioner, as well as all the physicians who testified, agree that sterilization would lead to greater autonomy and normalization for Cynthia. Even Mr. McFalls, director of Ken Crest, conceded that much of Cynthia's supervision was motivated by the effort to avoid sexual activity, as much as to observe possible seizures.

The eloquent opinions of the British judges in the case of Re B (2 All ER, 2

WLR 1213, FLR 314) decided by the House of Lords on April 30, 1987, are impressive. The facts are strikingly similar. "B" was a mentally handicapped and epileptic 17 year old girl who had a mental age of five or six. She had no comprehension of reproduction, was unable to give informed consent, and would be unable to care for a child. She lived in a local authority home and spent weekends at her mother's home. Five Judgments were issued by the Lords affirming the family court's order of sterilization by occlusion of the fallopian tubes. Lord Hallsham of St. Marylebone held:

> "To talk of the 'basic right' to reproduce of an individual who is not capable of knowing the causal connection between intercourse and childbirth, the nature of pregnancy, what is involved in delivery, unable to form maternal instincts or to care for a child <u>appears to me wholly to part company with reality</u>." (underlining supplied).

In agreeing that a tubal ligation was appropriate, Lord Bridge of Harwick observed:

> ". . .This case has nothing whatever to do with Eugenic theory or with any attempt to lighten the burden which must fall on those who have the care of the ward. It is concerned, and concerned only, with the question of what will promote the welfare and serve the best interests of the ward."

These eminently logical and sensible expressions of the British Court prompt this Court to express its skepticism about the reasonableness of the opposition of the guardian ad litem to the tubal ligation.

Judicial proceedings for the authorization of sterilization are extraordinarily difficult, time consuming, expensive and stressful to all concerned. Cynthia's mother is of modest means. Her counsel has expended enormous amounts of

time on this matter, as has the guardian ad litem who serves without compensation. The prospect of serial proceedings as various improbable alternatives are tried and discarded simply because of their appeal to the over-zealous libertarian mocks the judicial process.

The basic human right to reproduce is meaningful only when such procreation is the result of informed choice. Certain retarded and mentally impaired individuals may be capable of making such a choice and their right to choose must be safeguarded. Because of organic brain damage and retardation, Cynthia is incapable of making such a choice. Thus, the loss of choice is the loss of an illusory right only. Her welfare and best interests are best promoted by providing maximum protection against pregnancy.

Accordingly, the petition to appoint Dolores Wasiak guardian of the person of Cynthia Wojciechowski to consent to her sterilization by tubal ligation is granted.

Jamison /s/
J.

DATED: February 28, 1990

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

NO. 3107 of 1987

Estate of CYNTHIA WOJCIECHOWSKI,
Alleged Incompetent

GUARDIAN'S MEMORANDUM IN SUPPORT OF HER PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Introduction

On September 4, 1987, Delores Wasiek petitioned this court for an order appointing her as guardian over the person of her daughter, Cynthia Wojciechowski, for the purpose of consenting to sterilization by tubal ligation on her daughter's behalf. On October 30, 1987 the court appointed the undersigned as Guardian Ad Litem to represent the best interests of Ms. Wojciechowski in this proceeding. Five hearings were held at which testimony for and against the propriety of the

proposed sterilization was taken. The case now stands ready for decision.

It is respectfully suggested that the present record does not support the request for sterilization and that therefore, the petition should be denied. Petitioner has failed to establish by clear and convincing evidence that sterilization is necessary in order to advance the best interests of Ms. Wojciechowski as required by Matter of Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1983). The unrebutted evidence concerning Ms. Wojciechowski's life circumstances make sterilization a far greater intrusion than necessary to protect her from pregnancy. As such, sterilization would unconstitutionally impinge upon her right to bodily integrity and her right to reproductive autonomy. For these reasons and the

reasons that follow, an order authorizing sterilization would be inappropriate, and the request for it should be rejected.

. . .

Argument

1. Terwilliger and The Governing Legal Standards

Proposed sterilizations of the mentally retarded in Pennsylvania are strictly governed by Matter of Terwilliger, 304 Pa. Super, 553, 450 A.2d 1376 (1983). Recognizing the constitutional implications which sterilization has for a mentally retarded person, the Pennsylvania Superior Court took pains in Terwilliger, a case of first impression in the Commonwealth, to "ensure that when sterilization is sought, the incompetent's rights are jealously guarded." Id., 450 A.2d at 1382. That court held that no sterilization could be ordered without clear and

convincing proof that it is in the best interest of the mentally retarded person. This standard cannot be satisfied without strict proof that "sterilization is the only practicable means of contraception, i.e., all less drastic contraceptive methods, including supervision, education, and training are unworkable." Id., 450 A.2d at 1383. Furthermore, testimony must show that "the sterilization procedure requested is the least significant intrusion necessary to protect the interests of the individual." Id.

Although Terwilliger was the first official pronouncement by a Pennsylvania court in recent years on the sterilization issue, the decision was consistent with those of courts from other states in which the issue had been analyzed and standards developed. These cases were premised upon

two separate aspects of the constitutional right of privacy -- the right to bodily integrity and the right of procreative choice. See e.g., Matter of Moe, 385 Mass. 555, 432 N.E.2d 712 (1982). In Re Grady, 85 N.J. 235, 426 A.2d 467 (1981). Matter of CDM, 627 P.2d 607 (Alaska 1981); North Carolina Association of Retarded Children v. North Carolina, 420 F.Supp. 451 (1976). Recognition of these rights on behalf of the mentally retarded coincided with belated societal acknowledgement that the retarded are entitled to the same basic civil and constitutional rights as other citizens, and changing views concerning the capabilities of the retarded as well. By the 1970's, the negative stereotypes which previously governed our treatment of the retarded had been replaced with a developmental approach which

recognized the potential of every retarded person to grow, develop and learn. See generally Macklin & Gaylin, Mental Retardation and Sterilization (1981). Principles of normalization, which dictated that to the greatest extent possible the retarded person should be treated as if no handicap existed, and the closely allied doctrine of least restrictive alternative, through which normalization principles were implemented, became the keystones of service delivery to the mentally retarded community. See generally, Turnbill, The Least Restrictive Alternative: Principles and Practice (1981). [9] They were further reflected

[9] These principles have been adopted by both the Pennsylvania Legislature and the Pennsylvania Supreme Court for all matters relating to the mentally retarded in this case. In Re Schmidt, 494 Pa. 86,

not only in sterilization decisions nationwide, but in other cases involving the care, treatment, and education of the regarded. See e.g., Youngberg v. Romeo, 457 U.S. 307 (1982); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), 612 F.2d 84 (3d Cir. 1979), 446 F. Supp. 1295 (E.D. Pa. 1977); Rennie v. Klein, 462 F. Supp. 1131 (D. N.J. 1978), modified and remanded, 653 F.2d 836 (3d Cir. 1981). See also, In Re Schmidt, supra.

. . .

This result was not only consistent with prior sterilization decisions, but was required by the dictates of the Fourteenth Amendment to the United States Con-

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429 A.2d 631 (1981); Mental Health Procedures Act, Act of 1976, July 0 [sic], P.L. 817, No. 143, § 101, 50 P.S. § 7101.

stitution as well. Terwilliger recognized the importance of procreational freedom, even for those mentally retarded persons unable to choose between reproductive alternatives. Clearly, where infringement upon constitutional rights is at stake, the least drastic alternative to achieve a particular purpose must be utilized. Shelton v. Tucker, 364 U.S. 479 (1960). See also, In Re Schmidt, supra (least restrictive alternative governs decisions affecting the mentally retarded in Pennsylvania).

The United States Supreme Court, too, has made clear that where educational or supervisional alternatives can reduce a mentally retarded person's need for bodily restraint, the Fourteenth Amendment requires that such methods be pursued before more restrictive alternatives are insti-

tuted. The right to bodily integrity of course, was firmly embedded in the common law [10] and has long been recognized as one of our most sacred constitutional rights. Justice Brandeis referred to it as "the right to be left alone -- the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 227 U.S. 438, 478 (1927). Freedom from arbitrary invasions of bodily integrity and personal security are at the core of the liberty protected by the Due Process Clause. Youngberg v. Romeo, 457 U.S. 307 (1982). They are implicit in the

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[10] See generally Cantor, "A Patient's Decision to Decline Life Saving Treatment: Bodily Integrity Versus the Preservation of Life", 26 Rutgers L. Rev. 228, 236 (1973). See also In Re A.C., 533 A.2d 611 (1987); In Re Gardner, 534 A.2d 947, 951 (Maine, 1987); Matter of Conroy, 486 A.2d 1209 (N.J. 1985). Matter of Moe, supra; In Re Guardianship of Grant, 747 P.2d 445 (Wash. 1988); Matter of Welfare of Colver, 660 P.2d 738 (Wash. 1983).

Fourth and Ninth Amendments as well, and are deemed to be fundamental. See generally "Federalism and Fundamental Rights: The Ninth Amendment", 38 Hastings Law J. 305 (1987). See also, Scott v. Plante, 532 F.2d 939, 946 n.9 (1976); Runnels v. Rosendale, 499 F.2d 733, 735 (9th Cir. 1974); Matter of Quinlan, 355 A.2d 647 (N.J. 1976). The right to bodily integrity is not dependent, of course, upon intellectual capacity, but is an inherent aspect of personhood not diminished in any way by mental incompetence. Youngberg; see also, Brophy v. New England Sinai Hospital, 497 N.E.2d 626 (Mass. 1986).

The U.S. Supreme Court addressed this issue in Youngberg v. Romeo, supra, in which the issue presented involved the restrictiveness of a mentally retarded man's program at Pennhurst State School

and Hospital. Nicholas Romeo, who had an I.Q. of 8 or 9, was constantly placed in physical restraints which caused him to hurt himself and left him open to abuse by other patients. Mr. Romeo's mother sued Pennhurst, alleging that its treatment of her son violated his right to be free from bodily restraint, and arguing that with appropriate education Mr. Romeo would require far less restrictive treatment. The Supreme Court required training in order to protect Mr. Romeo's liberty interests in safety and a minimum of physical restraint, since with appropriate education his behavior could be improved, enabling him to participate in the therapeutic community under less restrictive circumstances. Id., 457 U.S. at 319.

This principle is just as applicable in the sterilization context, as Terwil-

liger and its predecessors implicitly recognized. Where educational and/or supervisional programs can be utilized to increase a mentally retarded person's level of social functioning, and thereby reduce the risk of pregnancy, and thus the need for contraception of an kind, such methods must be employed. Surgical alternatives are simply not warranted under such circumstances, and by definition are not least restrictive. [11] Likewise, if contraceptive methods are available which could provide pregnancy effectively and more normatively without the need for bodily invasion, sterilization is not the least restrictive alternative. This was

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[11] The fact that the tubal ligation is a relatively simple operation under ordinary circumstances is irrelevant to this analysis. Any invasion of the body which can be avoided by appropriate education and/or supervision is inappropriately restrictive.

the case with sexually active Mildred Terwilliger. As will be discussed more fully below, it is also true with Cynthia Wojciechowski, who is not sexually active, and whose chances of becoming pregnant in the foreseeable future were conceded by petitioner's own experts to be slight.

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

NO. 3107 of 1987

Estate of CYNTHIA WOJCIECHOWSKI,
Alleged Incompetent

GUARDIAN'S EXCEPTIONS
TO OPINION AND ORDER

Cynthia Wojciechowski, through her Guardian Ad Litem, Lorrie McKinley, Esquire, hereby makes the following exceptions to the February 28, 1990 opinion and order of the Honorable Judith Jamison which authorized Ms. Wojciechowski's mother, Delores Wasiek, to consent to a laparoscopic tubal ligation on her behalf:

1. The opinion and order contravene controlling principles announced in In Re Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1983) and In Re Rubis, Fid. Rep. 412 (1984), both of which prohibit steriliza-

tion of an incompetent without clear and convincing evidence that sterilization is the only practicable means of contraception; i.e. "that all less drastic contraceptive methods, including supervision, education, and training are unworkable: and that "the sterilization procedure requested is the least significant intrusion necessary to protect the interests of the individual". The court's rejection of less restrictive methods of pregnancy prevention, including education, supervision, and training, was not supported by clear and convincing evidence. See also In Re Schmidt, 494 Pa. 86, 429 A.2d 631 (1981) (requiring least restrictive alternatives in all matters affecting the mentally regarded).

2. The opinion and order further disregard Ms. Wojciechowski's constitu-

tional rights of bodily integrity and reproductive autonomy as defined by the United States Supreme Court. See e.g. Youngberg v. Romeo, 457 U.S. 307 (1982), Roe v. Wade, 410 U.S. 113 (1973).

3. The opinion and order, being contrary to law and fact, are not in Ms. Wojciechowski's best interest.

Respectfully submitted,

/s/
LORRIE McKINLEY
Guardian Ad Litem for
Cynthia Wojciechowski

Date: March 7, 1990

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

NO. 3107 of 1987

Estate of CYNTHIA WOJCIECHOWSKI,
Alleged Incompetent

GUARDIAN'S MEMORANDUM IN SUPPORT OF EXCEPTIONS TO TRIAL COURT'S TO OPINION AND ORDER

. . .

4. The Court's Decision Failed To Acknowledge or Protect Ms. Wojciechowski's Constitutional Rights to Bodily Integrity and Reproductive Autonomy.

The Trial court in its decision failed to acknowledge at all Ms. Wojciechowski's liberty interest in bodily integrity and characterized her right to reproductive autonomy as "illusory". Adopting the wording of a 1987 decision by the House of Lords, the Judge concluded that:

> To talk of the "basic right" to reproduce of an individual who is not capable of knowing the causal connection between intercourse and childbirth, the

> nature of pregnancy, what is involved in delivery, unable to form maternal instincts or to care for a child appears to me wholly to part company from reality. (underlining supplied by trial court)

One would search in vain for an American decision during the past twenty years which so cavalierly disposes of an incompetent's right to reproductive autonomy. The numerous American courts, including Terwilliger, which have addressed this issue have been unanimous in their concern for this basic freedom. It is precisely because the sterilization decision impinges so directly on a constitutional right that the least restrictive alternative approach was adopted in such cases. Beginning with Shelton v. Tucker, 364 U.S. 479 (1960) the Supreme Court had required this approach where infringement upon constitutional rights is at stake.

The United States Supreme Court has made clear that where educational or supervisional alternatives can reduce a mentally retarded person's need for bodily restraint, the Fourteenth Amendment requires that such methods be pursued before more restrictive alternatives are instituted. This is premised upon the right to bodily integrity, which of course, was firmly embedded in the common law. [24] Although it is not specified in the Constitution, it is an aspect of the right to privacy which arises from the penumbras of the First, Third, Fourth, Fifth and

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[24] See generally Cantor, "A Patient's Decision to Decline Life Saving Treatment: Bodily Integrity Versus the Preservation of Life", 26 Rutgers L. Rev. 228, 236 (1973). See also In Re A.C., 533 A.2d 611 (1987); In Re Gardner, 534 A.2d 947, 951 (Maine, 1987); Matter of Conroy, 486 A.2d 1209 (N.J. 1985). Matter of Moe, supra; In Re Guardianship of Grant, 747 P.2d 445 (Wash. 1988); Matter of Welfare of Colver, 660 P.2d 738 (Wash. 1983).

Ninth Amendments. Freedom from arbitrary invasions of bodily integrity and personal security are thus within the core of the liberty protected by the Due Process Clause. Youngberg v. Romeo, 457 U.S. 370 (1982). Justice Brandeis referred to this as "the right to be left alone -- the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 227 U.S. 438, 478 (1927). Accord, Union Pacific Ry Co. v. Botsford, 141 U.S. 250 (1891). See generally "Federalism and Fundamental Rights: The Ninth Amendment", 38 Hastings Law J. 305 (1987). See also, Scott v. Plante, 532 F.2d 939, 946 n9 (1976); Runnels v. Rosendale, 499 F.2d 733, 735 (9th Cir. 1974); Matter of Quinlan, 355 A.2d 647 (N.J. 1976); Foody v. Memorial Hospital, 482 A.2d 713 (Conn. Super. 1984). The right

to bodily integrity is not dependent, of course, upon intellectual capacity, but is an inherent aspect of personhood not diminished in any way by mental incompetence. Youngberg; see also, Brophy v. New England Sinai Hospital, 497 N.E.2d 626 (Mass. 1986).

Although the principle of least restrictive alternative and its nexus with the right to bodily integrity was not squarely presented in Youngberg, the facts presented there and the Court's analysis are instructive here. The case involved the restrictiveness of a mentally retarded man's program at Pennhurst State School and Hospital. Nicholas Romeo, who had an I.Q of 8 or 9, was constantly placed in physical restraints which caused him to hurt himself and left him open to abuse by other patients. Mr. Romeo's mother sued

Pennhurst, alleging that its treatment of her son violated his right to be free from bodily restraint, and arguing that with appropriate education Mr. Romeo would require far less restrictive treatment. The Supreme Court required training in order to protect Mr. Romeo's liberty interests in safety and a minimum of physical restraint, since with appropriate education his behavior could be improved, enabling him to participate in the therapeutic community under less restrictive circumstances. Id., 457 U.S. at 319.

This principle is just as applicable here, as Terwilliger recognized. Where educational and/or supervisional programs can reasonably be expected to increase a mentally retarded person's level of social functioning, and thereby reduce the risk of pregnancy, and thus the need for con-

traception of any kind, such methods must be employed and found unworkable prior to any order for sterilization. Surgical alternatives are simply not warranted under such circumstances. By definition they constitute an unjustified intrusion upon the mentally retarded person's right to bodily integrity and can never be least restrictive.

The relative ease with which a tubal ligation can generally be performed does not negate this conclusion. Any invasion of the body which can be avoided by appropriate education and supervision is inappropriately restrictive and intrusive upon constitutional rights. In this case, Ms. Wojciechowski's rights to bodily integrity and procreative autonomy may not be cast aside on the theory that the unnecessary intervention can be easily performed.

Terwilliger prohibits such a result absent a clear and convincing showing that no other alternative, including education, supervision, and training, can provide Ms. Wojciechowski with effective pregnancy protection. The Fourteenth Amendment requires no less, and no such showing has been made here. Since the trial court's opinion fails to comport with these principles, its judgment must be reversed.

IN THE SUPERIOR COURT OF PENNSYLVANIA

IN RE: Estate of Cynthia Wojciechowski,
an alleged incompetent

No. 02970PHL91

BRIEF FOR THE APPELLANT

Appeal From The Order Of The Court
Of Common Pleas Of Philadelphia
County, Orphan's Court Division,
Docket No. 3107 of 1987

Lorrie McKinley, Esquire
Guardian Ad Litem for
Cynthia Wojciechowski

Penn Legal Assistance Office
International house, 6W
3701 Chestnut Street
Philadelphia, PA 19104
(215) 898-8427

December 2, 1991
Resubmitted November 9, 1993

STATEMENT OF QUESTIONS INVOLVED

1) Did The Orphan's Court En Banc inappropriately apply Matter of Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1983), when it granted petitioner's request for sterilization absent evidence that all less drastic means [of contraception], including education supervision, and training, are unworkable?

2) Did the Orphan's Court En Banc by its order granting petitioner's request for sterilization of the appellant violate the appellant's constitutional right of privacy, including her right to bodily integrity and reproductive autonomy?

STATEMENT OF THE CASE

This case comes before the Superior Court en banc on appeal from the August 1,

1991 opinion and decree of the Court of Common Pleas of Philadelphia County, Orphans' Court Division En Banc, which granted petitioner the authority to consent to tubal ligation on behalf of Cynthia Wojciechowski, the appellant in this action. Ms. Wojciechowski, through her undersigned guardian ad litem, seeks reversal of the court's order since it is contrary to law and unsupported by the record. Specifically, the court erred by concluding that clear and convincing evidence exists that sterilization is necessary to advance the best interests of Cynthia Wojciechowski as required by Matter of Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1983). Terwilliger is of course controlling here. Furthermore, the court's opinion fails to protect Ms. Wojciechowski's constitutional right to

privacy by impinging upon her interests in bodily integrity and procreative autonomy. These errors of law require that the trial court's opinion be reversed.

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ARGUMENT

I. Introduction

Proposed sterilizations of the mentally retarded in Pennsylvania are strictly governed by Matter of Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1983). Recognizing the constitutional implications which sterilization has for persons with mental retardation, this Court took pains in Terwilliger, a case of first impression in the Commonwealth, to "ensure that when sterilization is sought, the incompetent's rights are jealously guarded." Id., 450 A.2d at 1382. The court held that no sterilization can be

ordered without clear and convincing proof that it is in the best interest of the mentally retarded person. This standard cannot be satisfied without strict proof that "sterilization is the only practicable means of contraception, i.e., all less drastic contraceptive methods, including supervision, education, and training are unworkable." Id. 450 A.2d at 1383. Furthermore, testimony must show that "the sterilization procedure requested is the least significant intrusion necessary to protect the interests of the individual."

The decision of the Orphans' Court falls far short of establishing that the sterilization of sexually inactive and highly supervised Cynthia Wojciechowski meets Terwilliger's exacting standard. While the Court purported to apply Terwil-

liger, many of its most crucial findings are not supported by the record. Its reliance upon such findings to authorize the sterilization at issue here contravenes the teachings of Terwilliger and trammels upon Ms. Wojciechowski's constitutional right to privacy. As such, the lower court's ruling must be reversed.

II. Terwilliger and The Right to Privacy

Although Terwilliger was the first official pronouncement by a Pennsylvania court in recent years on the sterilization issue, it was consistent with decisions from other states in which the issue had been analyzed and standards developed. These cases were premised upon two separate aspects of the constitutional right of privacy -- the right to bodily integrity and the right of procreative choice. See e.g., Matter of Moe; 385 Mass. 555, 432

N.E.2d 712 (1982); In Re Grady, 85 N.J. 235, 426 A.2d 467 (1981); Matter of CDM, 627 P.2d 607 (Alaska 1981); North Carolina Association of Retarded Children v. North Carolina, 420 F. Supp. 451 (1976). Recognition of these rights on behalf of persons with mental retardation coincided with belated societal acknowledgement that persons with retarda-tion are entitled to the same basic civil and constitutional rights as other citizens, and changing views concerning the capabilities of persons with retardation as well. By the 1970's, the negative stereotypes which previously governed our treatment of persons with retardation had been replaced with a developmental approach which recognized the potential of every retarded person to grow, develop and learn. See generally Mackin & Gaylin, Mental

Retardation and Sterilization (1981). Principles of normalization, which dictated that to the greatest extent possible the person with retardation should be treated as if no handicap existed, and the closely allied doctrine of least restrictive alternative through which normalization principles were implemented, became the keystones of service delivery to the mentally retarded community. See generally, Turnbull, The Least Restrictive Alternative: Principles and Practice (1981). They were further reflected not only in sterilization decisions nationwide, but in other cases involving the care, treatment, and education of the retarded. See e.g., Youngberg v. Romeo, 457 U.S. 307 (1982); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), 612 F.2d 84

(3d Cir. 1979), 446 F. Supp. 1295 (E.D. Pa. 1977); Rennie v. Klein, 462 F.Supp. 1131 (D.N.J. 1978), modified and remanded, 653 F.2d 836 (3d Cir. 1981). Prior to Terwilliger the Pennsylvania legislature and Supreme Court determined that these principles should govern all matters relating to the mentally retarded in this state. In Re Schmidt, 494 Pa. 86, 429 A.2d 631 (1981); Mental Health Procedures Act, Act of 1976, July 8, P.L. 817, No. 143, § 101, 50 P.S. § 7101.

Against this backdrop Terwilliger required that any proposed sterilization be proven by clear and convincing evidence as the least restrictive alternative for the individual. By definition, any alternative not the least restrictive of the individual's capacities and/or potential for growth could not be in the

person's best interest. This view was consistent with previously decided sterilization cases and has been adopted by subsequent courts as well. E.g., In Re Grady, supra; In Re: Hillstrom, 363 N.W.2d 871 (Minn. 1985).

In addition to its consistency with state law and the views of other courts, the result in Terwilliger was constitutionally required. At least since Shelton v. Tucker, 364 U.S. 479 (1960), where infringement upon fundamental rights is concerned, the least restrictive means must be utilized by courts and governmental entities in pursuit of legitimate objectives to preserve as far as possible individual liberty. See also NAACP v. Alabama, 377 U.S. 288 (1964); Rennie v. Kline, 653 F.2d 836 (3d Cir. 1982);

Sinmark Associates v. Township of Willingboro, 535 F.2d 786 (3d Cir. 1976). In other words, the government can do no more than is necessary to accomplish its objective. There can be no question that the sterilization of a person with mental retardation permanently extinguishes the right to procreate, a fundamental constitutional interest, and at the same time impinges upon another fundamental privacy right, the right to bodily integrity. See e.g., Winston v. Lee, 470 U.S. 753 (1984); Matter of Moe, 385 Mass. 555, 432 N.E.2d 712 (1982); In re Grady, 85 N.J. 235, 426 A.2d 467 (1981); Matter of CDM, 627 P.2d 607 (Alaska 1981); Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976); North Carolina Association of Retarded Children v. North Carolina, 420 F. Supp. 451 (1976).

As such, the least restrictive alternative approach is constitutionally mandated. Justice Brandeis described the right to bodily integrity as "the right to be left alone -- the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 227 U.S. 438, 478 (1927). Accord, Union Pacific Ry Co. v. Botsford, 141 U.S. 250 (1891). See generally "Federalism and Fundamental Rights: The Ninth Amendment", 38 Hastings Law J. 305 (1987). See also, Scott v. Plante, 532 F.2d 939, 946 n9 (1976); Runnels v. Rosendale, 499 F.2d 733, 735 (9th Cir. 1974); Matter of Quinlan, 355 A.2d 647 (N.J. 1976); Foody v. Memorial Hospital, 482 A.2d 713 (Conn. Super. 1984).

The constitutional interest in bodily integrity, sometimes referred to as per-

sonal autonomy or freedom from non-consensual bodily invasion, belongs to both competent and incompetent individuals. Cruzan v. Missouri Department of Health, ___ U.S. ___, 110 S.Ct. 2481 (1990), Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976). As stated in Browning v. Herbert, 568 So.2d 4 (Fla. 1990): "the primary concern ... is that this valuable right should not be lost because the ... condition of the patient prevents a conscious exercise of the choice to refuse ... treatment." Accord, Quinlan, 355 A.2d at 664. See also, Youngberg, supra; Brophy v. Mount Sinai Hospital, 497 N.E.2d 626 (Mass. 1986); Terwilliger, supra.

Indeed, it is the fact of Ms. Wojciechowski's incompetence, and that of others like her, which makes the right to bodily integrity so significant. The most power-

less numbers of society need to rely most on constitutional barriers against bodily intrusion because they are unable to communicate decisions concerning their wishes. The significance of their rights can be easily trivialized by those in a position to make those decisions for them, even despite the most benign motives.

This problem was well exemplified at several points during the trial in this case. It was the singular fact of Ms. Wojciechowski's mental retardation that led petitioner's experts to recommend the invasive sterilization procedure rather than some less restrictive alternative. Without exception, petitioner's experts conceded that with a medical profile identical to Ms. Wojciechowski's, they would not recommend sterilization for a woman who was not mentally retarded. N.T. at

110, 213-214, 248. See also N.T. 8/17/89 at 59-60. This undermines completely the testimony given by these experts as to the urgency of sterilization to protect Ms. Wojciechowski from untoward medical consequences, and demonstrates how something which would be considered a dramatic invasion on the personhood of one with normal intelligence is seen as not significant to the person with retardation. This distinction is even more stark, considering the fact that the normal person would have the opportunity to consent to the procedure, where there can be no consent here. So reluctant would these experts be to effectuate such an extinguishment of a fundamental right, that they would not recommend or perform the procedure even if requested by a normal adult of Ms. Wojciechowski's age.

The trial court's treatment of the issue suffered from the same insensitivity to the significance of Ms. Wojciechowski's right to privacy. As did the court En Banc, the trial court failed to acknowledge any interest Ms. Wojciechowski might have to bodily integrity. Her perception that Ms. Wojciechowski's right to procreative autonomy was illusory, and the ease with which that right could be extinguished, were dispositive for the trial judge. Obviously, this misses the point. Any invasion of the body to accomplish something which can just as effectively be achieved through education and supervision is inappropriately restrictive and intrusive upon the right to bodily integrity, which is not diminished in any way by the fact of incompetence. See Youngberg, supra (where training could reduce the

level of bodily restraint and permit functioning with fewer restrictions, it must be provided).